BOARD FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS

FINAL STATEMENT OF REASONS

Hearing Date: July 26, 2002.

Subject Matter of Proposed Regulations: Definitions of "negligence," "incompetence," "electrical engineering," and "mechanical engineering"

Section Affected: Title 16, California Code of Regulations section 404

Updated Information: The Initial Statement of Reasons is included in the file. The Board received a timely request for a public hearing on this proposal. Therefore, a public hearing was held on July 26, 2002.

Local Mandate: A mandate is not imposed on local agencies or school districts.

Business Impact: This regulation will not have a significant adverse economic impact on businesses.

Underlying Data
Technical, theoretical or empirical studies or reports relied upon (if any):

1. Definitions of "negligence" and "incompetence"
   K. Agenda Item, including a letter from DAG Ruff, and Minutes from the April 25-26, 2002, Board Meeting
   [NOTE: The Draft Minutes as listed in the Initial Statement of Reasons were approved and adopted in whole by the Board at its June 13-14, 2002, meeting with no changes. Therefore, the final Minutes are included in the rulemaking file.]

Consideration of Alternatives: No reasonable alternative which was considered or that has otherwise been identified and brought to the attention of the Board would be either more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation.

Summary of Comments Received and Board Response
A summary of comments received regarding this rulemaking file and the Board's response to those comments are included in this Final Statement of Reasons. The actual written comments received are contained in the rulemaking file under Tab XI. The transcript of the public hearing is contained in the rulemaking file under Tab X.

Comments were received from a Geotechnical Engineer, an attorney on behalf of a professional association representing consulting engineers and land surveyors, two Structural Engineers, and a Registered Geologist/Certified Engineering Geologist. In the summary of the comments and

Board responses below, these individuals are referred to as "GE," "attorney," "SE-G," "SE-K," and "RG/CEG," respectively.

COMMENT: The GE submitted written comments stating that 16 CCR §404 is not the appropriate section for the definitions of "negligence" and "incompetence" because 16 CCR §404 contains the definitions of the various branches of professional engineering.

RESPONSE: The Board rejects this comment. 16 CCR §404 contains the definitions of numerous words and phrases used in the Professional Engineers Act (Business and Professions Code section 6700, et seq.), the Professional Land Surveyors' Act (Business and Professions Code section 8700, et seq.), and the Board Rules (Title 16, California Code of Regulations section 400, et seq.), not just the definitions of the various branches of professional engineering. Therefore, this is the most appropriate section for definitions of two terms used in the Professional Engineers Act and the Professional Land Surveyors' Act.

COMMENT: The GE also submitted written comments indicating that the proposed definition of "negligence" does not account for the variations in practice based on time and locality in which the work was performed.

RESPONSE: The Board rejects this comment. The phrase "care ordinarily exercised in like cases," as used in the Board's proposed definition, is broad enough to cover variations in practice due to region and time. It will be the standards set by the industry itself that determine what constitutes the "care ordinarily exercised in like cases." Expert engineers and land surveyors will assist the Board with information regarding any regional variations in practice and the way the practice has evolved over time.

COMMENT: The attorney submitted written comments expressing his appreciation to the Board for including language limiting both definitions to the purpose of investigating complaints and making findings thereon and indicated that he believes that this language will assist in limiting the use of the definitions to only disciplinary actions investigated by the Board.

RESPONSE: The Board accepts this comment. However, no changes are required to be made to the language as noticed.

COMMENT: The attorney also submitted written comments indicating that the definitions must set forth the required "nexus" or connection between a licensee's conduct and the licensee's fitness to practice his profession. The attorney suggests that a "nexus" can only be found if the requirements of tort law are met, especially for the definition of "negligence." The attorney proposes three hypothetical situations in which he believes the Board's definition may lead to unnecessary disciplinary action.

RESPONSE: The Board rejects these comments. The attorney first expresses a concern that the proposed definitions of negligence and incompetence do not carry

the required "nexus" between the licensee's conduct and his fitness to practice his profession. The attorney is correct that such a nexus is required, but mistaken when he indicates that it must be set forth in the Board's statutes or regulations. Instead, the requirement that a licensee's conduct be related to his fitness to practice takes its origin from constitutional and case authorities. It is not necessary to include that language in the Board's regulations; fitness to practice will always be a primary consideration in any license discipline case, no matter what definitions are used.

Likewise, the attorney is mistaken when he suggests that a "nexus" can only be found if the requirements of tort law are met. As his letter acknowledges, the purposes of licensing law are different from those of tort law. Tort law is deigned to provide compensation to one who has already suffered injury. Licensing law is designed to protect the public from future harm. Adopting the tort law requirements of causation and damage will thwart the purposes of licensing law and hinder the Board's mission to protect California consumers.

In his letter, the attorney proposes three hypothetical situations in which the Board's definition may lead to unnecessary disciplinary action. In the first, he expresses concern that a competitor of an engineer might file a complaint against a licensee. It is true that a complaint filed by a competitor might lead the Board to investigate an engineer, but no disciplinary action will be taken unless the Board independently confirms (usually through review of the case by industry experts) that the engineer has violated the law or presents a danger to the public in some manner.

The same is true for the other two hypothetical situations presented by the attorney. The Board would not pursue those cases without independent expert testimony that the licensees had failed to use the required care. Each licensee would be free to present evidence, both during the investigation and at hearing, to show that his conduct did not deviate from the required standard of care or, even if it did, that the deviation did not mean he is unsafe to practice.

The Board's proposed definitions are intended to clarify the existing law. The current definition of "negligence" is derived from case law. Negligence is currently defined as a "departure from the accepted standards of practice." The Board's proposed language will clarify that not every departure from the standards of practice will lead to discipline -- only those in which an engineer or land surveyor has failed to use the care ordinarily exercised by others in his profession. In this way, the Board's proposed definitions should help prevent the types of situations raised in the attorney's letter.

EXPLANATION OF WRITTEN AND ORAL COMMENTS RECEIVED AT HEARING: At the public hearing, SE-G submitted his own written comments as well as written comments from SE-K. In his testimony, SE-G summarized the written comments of SE-K and his own written comments. The week following the hearing, SE-G

submitted written comments correcting some of the written comments he had submitted at the hearing; these corrections were considered as if they were part of the original written comments submitted by SE-G. For purposes of the Board's responses, SE-G's summarization of SE-K's written comments are treated as part of SE-K's written comments, and SE-G's summarization of his own written comments are treated as part of those written comments. Testimony given by SE-G not covered in either set of written comments is responded to separately.

COMMENT: In his written comments, SE-K indicated that he believes that the court cases cited by the Board's Liaison Deputy Attorney General in her April 2002 letter to the Board [included as part of the Underlying Data, see Tab III] did not actually make a distinction between how negligence is defined in civil/tort matters and how it is defined in license discipline cases; he indicated that actual harm or damage must be included as part of the definition of "negligence" even in license discipline cases. SE-K also indicated that he believes the Board's proposed definition broadens the term "negligence" as it is currently used in license discipline cases or is inconsistent with state law. Furthermore, SE-K commented that he believes the term "care," as used in the Board's definition of "negligence," should not be used because it is not well-defined or, if it is used, then the Board should define it. Finally, SE-K commented that the proposed definition of "negligence" does not account for the variations in practice based on time and locality in which the work was performed.

RESPONSE: The Board rejects these comments. SE-K first expresses concern that the Board's proposed definition of negligence does not require a finding of actual harm. Contrary to SE-K's opinions, actual harm is not now, nor has it ever been, an element of a license discipline case against an engineer. However, because the Board has traditionally relied upon case law to establish the definition of negligence, learned members of the profession such as SE-K are often confused about the correct definition. Even Administrative Law Judges have occasionally been uncertain about the correct standard. That is why it is important for the Board to clarify the law by promulgating a formal regulation at this time. This clarification will assist both the public and the profession.

In a letter to the Board to explain why regulatory definitions of negligence and incompetence were needed, the Board's counsel had suggested a hypothetical situation in which an engineer made errors in calculations. Using that example, SE-K explains that error is inherent in the engineering method and asks how such errors may be a basis for discipline without actual harm resulting from the error. SE-K has apparently misunderstood the Board's proposed definition. SE-K is correct that competent engineers may make errors and still be safe to practice. For that reason, the Board's proposed definition of negligence does not rely upon the term "error," but instead uses a "care" standard. Not every error will give rise to discipline – only those errors in which the licensee has failed to use the care ordinarily exercised in like cases by other engineers.

In this way, the proposed definition uses the standards set by the industry itself. If errors of a particular type are within the standard of care for engineering practice, those errors will not be a basis for license discipline. The Board will rely upon experts in the engineering industry to determine if a particular error is serious enough to constitute a failure to use care by the engineer.

SE-K's other concerns about the hypothetical suggested by counsel, even if correct, are not relevant to the Board's proposed definition of negligence. The Board's counsel simply provided the hypothetical as an illustration, not as part of the proposed definition. Counsel is not an engineer and would no doubt rely upon the guidance of an expert in the industry should a real case of that type ever arise.

In his letter, SE-K next attempts to distinguish the cases cited by the Board's counsel as set forth in counsel's letter to the Board. In doing so, SE-K ignores the very explicit language of those cases. For example, the court in the case of *Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, made it very clear that actual harm is not an element of a license discipline case involving gross negligence:

> "However, Business and Professions Code section 2234 does not limit gross negligence or unprofessional conduct to the actual treatment of a patient – as opposed to administrative work – and <u>does not require injury or harm</u> to the patient before action may be taken against the physician or surgeon." *Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, 1053. (Emphasis added.)

SE-K attempts to distinguish the *Kearl* case by showing the doctor's conduct interfered with patient care. However, that factual showing does not change the clear language of the court with respect to the requirement of patient harm. SE-K's attempts to distinguish the other cases cited by counsel are also not well taken. Although not all the cases cited by counsel involved negligence, they all made it clear that actual harm is not required for license discipline.

Despite SE-K's concerns, the Board's proposed definition does not broaden the term "negligence" as it is currently used in license discipline cases. The definition of negligence currently being used in administrative hearings is based on case law and provides that negligence is a "departure from the accepted standards of practice." There is no requirement of harm in that definition, nor has there ever been.

SE-K also expresses concern that the Board's proposed definition does not account for variations in engineering practice based on time and locality in which the work was performed. SE-K is mistaken in this regard. The term "care ordinarily exercised in like cases" is broad enough to cover variations in engineering practice due to region and time. As stated above, it will be the industry standards which determine what constitutes the care "ordinarily exercised

in like cases." Expert engineers and land surveyors will be able to assist the Board with information regarding any regional variations in practice and the way the practice has evolved over time.

The next argument raised by SE-K is that the Board's proposed definition is not strict enough – it does not account for the situation in which industry practice may itself present a danger to the public. While SE-K is correct that the definition does not account for this situation, industry-wide change is best addressed through legislation or uniform codes drafted by the industry, not in a regulation defining a term for purposes of discipline.

SE-K also objects to the use of the term "care" without a definition of the term. SE-K attaches a scholarly paper on the ethics of care that he recently drafted. SE-K's paper presents a thoughtful and interesting discussion on the topic. However, it is not necessary for the Board to define the word "care" for purposes of its definition of negligence. The word has well established common-sense and legal meanings. Any further definitions of the definition would inject uncertainty into the Board's law instead of the simplicity and clarity which the proposed regulation is intended to provide.

Finally, there is no need to change the Board's definition to match the one set forth in the California jury instructions (BAJI). Licensing cases are not tort cases for damages and are not tried by a jury. The instructions given to a jury in a civil case are created to assist a jury in deciding whether one side should or should not pay money to the other side. Licensing laws are designed to protect the consumers of California. Civil jury instructions do not provide the protection necessary for the Board to fulfill its purpose to protect those consumers.

COMMENT: In his written comments, SE-G stated that it is his belief that the court cases cited by the Board's Liaison Deputy Attorney General in her April 2002 letter to the Board [included as part of the Underlying Data, see Tab III] did not actually make a distinction between how negligence is defined in civil/tort matters and how it is defined in license discipline cases; he indicated that actual harm or damage must be included as part of the definition of "negligence" even in license discipline cases. SE-G also indicated that he believes the Board's proposed definition broadens the term "negligence" as it is currently used in license discipline cases or is inconsistent with state law. Additionally, SE-G commented that he believes the term "care," as used in the Board's definition of "negligence," should not be used because it is not well-defined or, if it is used, then the Board should define it. Furthermore, SE-G commented that the Board's proposed definition of "incompetence" is unclear because it uses the phrase "discharging professional obligations" and that it incorrectly includes "knowledge," when it should include "skill." In addition, SE-G commented that the Board's definitions lack the necessary nexus or connection between the conduct of the licensee and his fitness to practice because the definitions do not include the elements of harm, or injury, and damage, as required in tort law. Finally, SE-G recommended that the Board not pursue

this regulatory proposal at this time, but instead should spend additional time discussing the appropriate definitions of "negligence" and "incompetence."

RESPONSE: The Board rejects these comments. In the summary section of SE-G's letter he expresses concern that the Board's proposed definitions are intended to "impermissibly enlarge existing law." SE-G is mistaken in this regard. The Board's regulations are intended to codify and clarify the current standards for negligence and incompetence used in licensing cases.

SE-G also suggests that it is not necessary for the Board to define negligence and incompetence at this time. However, the issues raised in his letter demonstrate the continuing confusion in the profession as to the definitions of negligence and incompetence used in license discipline cases. The Board's proposed definitions will provide a clear standard for the profession and for the administrative judges who hear cases, to replace the caselaw standard currently in use. The legislature has requested that the Board promulgate these regulations. The need for these regulations was not based on the Board's impending loss of a quorum.

SE-G is correct that clarity is essential for a Board's regulation. The proposed regulations defining negligence and incompetence are designed for that purpose. They will clarify the existing caselaw standards and set them forth in a manner that is easily understandable and easily accessible to the profession. SE-G expresses concern that "overzealous" Board staff will misinterpret the definitions. However, this will not happen because the Board staff will rely upon the expert opinion of members of the engineering and land surveying industry to determine when a violation of the standard has occurred. This is the same practice that has always existed with respect to Board cases involving negligence and incompetence.

With respect to SE-G's comments, starting on Page 4 of his letter, regarding the definition of incompetence, he is correct that incompetence by a licensee is a serious matter. However, he is mistaken when he states that the Board's proposed definition is unclear. The Board's proposed definition of incompetence is based almost directly on the definition developed by the courts in cases involving license discipline for other licensing agencies. The phrase "discharging professional obligations" comes directly from the case of *James v. Board of Dental Examiners* (1985) 172 Cal.App.3d 1096: "Incompetence is generally defined as the lack of knowledge or ability in the discharging of professional obligations." *James* at 1109. The court's standard is already used in license discipline cases at the present time. SE-G's unfamiliarity with that standard underscores the need to have that definition promulgated as a regulation to clarify and simplify the law for members of the profession.

The same situation applies with respect to the word "knowledge." Once again, this is taken directly from the *James* court's definition of incompetence and is a standard in use at the present time. SE-G raises concerns that the Board staff will

discipline licensees who acquire knowledge as a project continues. However, any discipline would have to be based on expert testimony regarding the requisite knowledge that a licensee should have at a given point in a job in order to discharge his or her professional obligations.

SE-G asks how the proposed definition of incompetence relates to Board regulation 415 (Title 16, California Code of Regulations section 415). He also raises several hypothetical situations and asks how the definition will relate in each of those cases. Since the proposed regulation is simply a codification of existing law, it should not change engineering or land surveying practice in any of the hypothetical situations he mentions.

With respect to his question regarding how the proposed definition relates to Section 415, the two sections might be thought of as opposite sides of a coin. Section 415 deals with the scope of work an engineer can undertake. It anticipates that an engineer will not work outside the area in which he or she has education and experience. It does not cover the situation in which an engineer who possesses the requisite education and experience in a particular area is still not capable of practicing safely. The Board's proposed definition of incompetence is designed to apply to the latter situation, though it may also apply to the former situation, depending on the individual circumstances of the case.

On Page 7 of the comments, SE-G raises another hypothetical in which a licensee who is incompetent to perform a certain task refuses to withdraw from the task. It is unlikely that such a hypothetical will occur, since a licensee who decides to "muddle through" despite his incompetence may face far worse penalties (including civil liability) if the job is improperly completed. Therefore there is no incentive for him to keep working on the job. Further, because incompetence is already a ground for discipline, SE-G's hypothetical could happen at the present time. The Board's proposed definition does not create a new standard. It merely clarifies already existing law by placing the court-made standard into regulation.

On Page 8 of his letter, SE-G addresses the proposed definition of negligence. SE-G first objects to the use of the word "care" and indicates that it is not well defined. Contrary to SE-G's opinions, the concept of "care" is a familiar one in law and will be a simple, clear standard for the Administrative Law Judge and expert witnesses to apply. The Board chose this standard rather than the "departure from accepted standards of practice" definition, which is currently in use in licensing cases, in order to clarify the standard for the profession and to bring it in line with familiar law. SE-G recognizes this in his following paragraph in which he discusses the similarities between the Board's proposed definition and existing law regarding negligence.

SE-G then suggests that, because the Board's definition of negligence is very similar to the definitions of negligence already in the law, there is no need for the regulation. However, there is confusion in the profession about the proper

definition, and occasionally Administrative Law Judges will decide to apply a different standard. To clarify the matter for the profession and to ensure uniformity of the law, the proposed definitions are necessary at the present time.

SE-G also raises concerns that the Board's proposed definition of negligence is inconsistent with state law. To the contrary, the proposed regulation is completely consistent with current law. Causation and damages are not elements of licensing cases. Damage to a consumer may have some relevance to issues of restitution and penalty, but it is not necessary to prove actual harm in order to discipline a license. Licensing laws operate to protect the public, not to provide compensation for past injuries.

On Pages 11 and 12 of his letter, SE-G discusses the cases cited by the Board's counsel in an opinion letter that counsel prepared for the Board regarding the definitions of negligence and incompetence. SE-G takes issue with counsel's interpretation of those cases and attempts to distinguish those cases from the Board's situation. It is true that no case has squarely defined negligence as it applies to discipline of engineers and land surveyors. (That is one of the reasons why the Board needs to clarify the law by promulgating regulations.) However, the cases cited by counsel with respect to other licensing Boards make it clear that causation and damage are not normally required elements of any license discipline cases. More specifically, the case of *Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, states that actual harm is not necessary in a licensing case involving gross negligence. The court stated:

> "However, Business and Professions Code section 2234 does not limit gross negligence or unprofessional conduct to the actual treatment of a patient – as opposed to administrative work – and <u>does not require injury or harm</u> to the patient before action may be taken against the physician or surgeon." *Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, 1053. (Emphasis added.)

SE-G's citations to tort cases do not change the Board's position since those authorities do not deal with license discipline. The purposes behind tort cases and license discipline cases are very different, and the definition of negligence in use in licensing cases does not require causation or damages. To add those two elements to licensing law would hamper the Board's ability to protect the public before injury occurs. Despite SE-G's attempts to dismiss case authority involving license discipline, those cases do exist, they do <u>not</u> require actual harm, and they are the basis for the current definition in use in the Board's enforcement actions. The Board's proposed regulation will clarify that existing standard and end the confusion in the profession.

As previously indicated, the definitions of "negligence" and "incompetence" as proposed by the Board simply codify and clarify the current standards for negligence and incompetence, as based on existing caselaw standards, that are

already in use at this time in licensing cases. As also previously indicated, the comments received from licensees of the Board clearly demonstrate that there exists a misunderstanding of these current standards on the part of the profession. Therefore, by adopting these proposed definitions into its regulations, the Board will be clarifying and simplifying the law for its licensees as well as providing a clear and uniform standard to be used in all of the Board's license discipline cases. In addition, the Board was directed by the Joint Legislative Sunset Review Committee (JLSRC) to adopt definitions of "negligence" and "incompetence." Specific language stating that might not have been placed into statute, but it was still a directive of the JLSRC, and it would be imprudent of the Board to ignore this directive.

COMMENT: At the public hearing, SE-G provided oral testimony regarding the Business and Cost Impact statements in the Notice of Proposed Rulemaking (see Tab I) and the Initial Statement of Reasons (see Tab II). SE-G questioned the statements of the Board that there were be no significant business or cost impact because of this rulemaking proposal. He stated that these conclusions do not take into consideration the increased litigation and insurance costs that licensees will have to pay when their clients will try to use the Board's definitions in civil litigation matters or in claims against a licensee's insurance.

RESPONSE: The Board rejects these comments. The Board has included specific language in the definitions to clarify that these definitions only apply to disciplinary actions taken pursuant to the provisions of the Professional Engineers Act and the Professional Land Surveyors' Act. The Board has no control over how other people might attempt to use these definitions in civil court matters or with insurance claims against licensees. Furthermore, state law does not require professional engineers or professional land surveyors to obtain insurance; therefore, it would be beyond the scope of the Board's statutory authority to address in a regulation what might or might not happen to the costs of a licensee's insurance when the licensee is not even required to obtain insurance.

COMMENT: With his written comments, SE-G also included a letter he had written and presented to the Board at the March 2002 Board meeting; SE-G indicated that he was submitted this March 2002 letter as part of his official comments on the rulemaking proposal.

RESPONSE: In its initial discussions of the rulemaking proposal, the Board reviewed and considered the comments and recommendations in SE-G's March 2002 letter. In fact, this letter is included in the rulemaking file as part of the Underlying Data (see Tab III). The Board has already considered the alternatives presented in this letter and addressed them in the Consideration of Alternatives described in the Initial Statement of Reasons, which is also a part of this rulemaking file (see Tab II), specifically Alternatives 1B and 1C.

COMMENT: At the public hearing, the RG/CEG addressed the definitions of "soil engineer" and "geotechnical engineer" and his belief that there is a difference in licensure or practice authority between a "soil engineer" and a "geotechnical engineer."

RESPONSE: The Board rejects this comment. Irrespective of the RG/CEG's mistaken belief that there is a difference in licensure or practice authority between a "soil engineer" and a "geotechnical engineer," the definitions of "soil engineer" and "soils engineering," as contained in 16 CCR §404, are not the subject of this rulemaking proposal.